Triumph Aerostructures, Vought Aircraft Division and Lawrence Hamm and Rodney Horn and Thomas Smith *and* The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 848. Cases 16–CA–197912, 16–CA–198055, 16–CA–198410, and 16–CA–198417

July 17, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 30, 2019, Administrative Law Judge Robert A. Ringler issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Union filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Union filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions as further discussed below and to adopt the recommended Order.

1. The judge dismissed the allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally imposing discretionary discipline by discharging Thomas Smith and suspending Rodney Horn. We agree with the judge's conclusion for the following reasons.

In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board held that if an employer exercises discretion under a preexisting disciplinary policy when it demotes, suspends, or discharges an employee, and a union has been certified or lawfully recognized as the employees' representative but the parties have not yet entered into a collective-bargaining agreement, the employer must give the union notice and opportunity to bargain before it decides to take that disciplinary action. Recently, however, the Board overruled *Total Security Management* and held that, upon commencement of a collective-bargaining relationship, employers do not have an obligation to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice. *800 River Road Operating Co.*, 369 NLRB No. 109, slip op. at 7 (2020). The Board applied its holding retroactively to all pending cases. See id. As noted by the judge, the Respondent discharged Smith and suspended Horn pursuant to its preexisting disciplinary policy. Accordingly, applying *800 River Road*, we find that the Respondent did not violate the Act by failing to give the Union notice and an opportunity to bargain before deciding to take these actions, and we shall dismiss those allegations.

2. We further agree with the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off 12 bond shop employees without negotiating to impasse. We agree that impasse is established here under *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub. nom. *Television Artists, AFTRA v. NLRB*, 395 F. 2d 622 (D.C. Cir. 1968). The Board in *Taft* defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." Id. at 478. Whether a valid impasse exists is a "matter of judgment," and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." Id. The burden of demonstrating an impasse rests on the party making the claim. See *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996).[2]

We find the *Taft* factors satisfied. The Respondent bargained in good faith, as evidenced by its initial bargaining proposal to "loan" bond shop employees at full pay to other jobs rather than lay them off.[3] The record further shows the Respondent's good-faith discussion with the Union on a wide range of aspects of that proposal, as well

[1] The parties have filed exceptions to some of the judge's evidentiary rulings. We find it unnecessary to resolve these exceptions as they do not affect the outcome of the case. For the same reason, we find it unnecessary to pass on the Respondent's Motion to Partially Strike the Union's exceptions and briefs.

The judge erroneously stated that the Respondent closed both its Dallas and its Grand Prairie, Texas facilities in 2013, when in fact the Respondent closed only its Dallas facility. We correct the judge's inadvertent error, which does not affect our decision.

[2] The commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 762 (1999). There are no such circumstances here.

[3] As the judge observed, the Respondent's initial loan proposal "was abundantly reasonable, and demonstrated a strong desire to reach agreement. [The Respondent's] opening salvo was to altruistically solve the overstaffing dilemma by not laying off anyone and only transferring affected bond shop workers to other departments for a short duration at their current pay."

as the proposal to permanently transfer the employees to another department. In each instance, the parties discussed in detail key issues, such as method of employee selection and rate of pay to be received.[4]

The length of negotiations and the volume of bargaining proposals exchanged additionally weigh in favor of finding impasse. The parties met for four bargaining sessions, even though their bargaining was limited to the sole topic of laying off bond shop employees.[5] The parties exchanged and discussed some seven different written bargaining proposals, covering a breadth of topics related to the layoff.[6] Importantly, the parties' ultimate disagreement was over an issue central to the proposals to loan or transfer employees in lieu of layoff: which party would control selection of individual employees for such loan or transfer.

Finally, the contemporaneous understanding of the parties as to the state of negotiations weighs in favor of impasse. At the final bargaining session on April 19, both parties essentially recognized that they had exhausted the prospect of reaching agreement on either of the two main proposals. Although the Union stated it was willing to continue bargaining, it offered no new proposals, instead indicating only that it could formulate some new proposals if given more time. While the Union's expression of willingness to continue bargaining is significant, it was not paired with articulation of any new proposals.[7] In these circumstances, absent more specific information from the Union to indicate that further bargaining would be fruitful, the Respondent was warranted in concluding that it would not be. See, e.g., *ACF Industries*, 347 NLRB 1040, 1041 (2006) (finding impasse where "[t]he Respondent had nothing left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals"; noting that the Union "gave the Respondent no reason to conclude that further bargaining at that time would have been fruitful").

We find for these reasons that the parties engaged in significant bargaining over the single issue of layoffs and reached impasse under *Taft* over the viability of alternatives to layoff.[8] We accordingly find that the Respondent satisfied its bargaining obligation with respect to the layoffs, and we shall dismiss the allegation that it failed to do so.

ORDER

The recommended Order of the administrative law judge is adopted and the second amended consolidated complaint is dismissed.

Dated, Washington, D.C. July 17, 2020

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Megan McCormick and *Bryan Dooley, Esqs.,* for the General Counsel.
David R. Broderdorf and *Lauren M. Emery, Esqs. (Morgan, Lewis & Bockius, L.L P.),* for the Respondent.
Rod Tanner, Esq. (Tanner & Associates, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Fort Worth, Texas, in April 2019. The complaint

[4] The Respondent's general good faith is also evidenced by its decades-long relationship with the Union at the Respondent's prior location and its voluntary recognition of the Union at the new facility involved here.

[5] The parties had agreed to carve out the layoff negotiations from their contemporaneous negotiations for an overall collective-bargaining agreement.

[6] As the judge found, the parties' bargaining "comprehensively covered, inter alia, transfers in lieu of layoffs, seniority-based layoff systems, other layoff ranking systems, recall and separation rights, voluntary retirement systems, and voluntary separations."

[7] The Board as well as the courts have emphasized that either party's willingness to continue negotiating towards an agreement weighs heavily against a finding of impasse. See, e.g.,*Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078,1084 (D.C. Cir. 1991) (stating that "the parties' perception regarding the progress of the negotiations is of central importance to the Board's impasse inquiry"); *PRC Recording Co*., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); see also *Quality Health Services v. NLRB*, 873 F.3d 375, 387 (1st Cir. 2017). Nevertheless, a party's "bare assertions of 'flexibility' on open issues and its generalized promises of 'new' proposals" do not, without more, preclude impasse. *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 776 (1990).

[8] The General Counsel and the Union argue that the Respondent withdrew its loan proposal at the April 7 bargaining session, and they except to the judge's failure to make a credibility determination to that effect. We do not pass on whether the record contains conflicting testimony on this issue warranting a credibility determination in the first place because, even assuming arguendo that the proposal was withdrawn, we find that impasse was reached under the elements of the *Taft* analysis on the basis of the balance of the existing record.

alleged that Triumph Aerostructures, Vought Aircraft Division (Triumph or the Respondent) violated §8(a)(1) and (5) of the National Labor Relations Act (the Act) by: unilaterally discharging bargaining unit employees without first affording the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 848 (the Union) notice and an opportunity to bargain; and laying off bargaining unit bond shop workers without negotiating to a good faith impasse. As will be explained, these allegations are meritless. On the record, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

Annually, Triumph, a corporation with a facility in Red Oak, Texas, manufactures aircraft components, and sells and ships more than $50,000 in products directly outside of Texas.[2] I find, as a result, that it is an employer engaged in commerce, within the meaning of §2(2), (6), and (7) of the Act. I also find that the Union is a §2(5) labor organization.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Between 1968 and 2013, the Union represented a multi-facility, production and maintenance unit at Triumph's Dallas and Grand Prairie, Texas plants. (Jt. Exh. Z.) In 2013, Triumph closed these plants and opened its Red Oak facility.[3] In early 2014, it voluntarily recognized the Union as the representative of this bargaining unit (the Unit):[4]

> **Included:** All production and maintenance employees employed at … [the] Red Oak [plant] ….
>
> **Excluded:** All other employees, electricians, office clerical employees, managerial employees and guards, professional employees and supervisors as defined in the Act.

(Jt. Exh. A.) Before its recognition, Triumph set initial terms and conditions of employment, including discipline and layoff policies. In 2015, the parties began bargaining. On March 25, 2018, they finalized a contract that ran until 2021 (the 2018 contract). (Jt. Exh. Y.) This litigation involves Triumph's actions between its 2014 recognition and the 2018 contract (i.e., the postrecognition/precontract period). The complaint challenged its layoff and unilateral discharges during this period. The central facts are undisputed.

B. Unilateral Discharges[5]

1. Facts

a. Extant Disciplinary Policy

In 2013, prior to its Union recognition, Triumph set this Red Oak discipline policy:

> General Offenses
>
> The following offenses are subject to the disciplinary action indicated:….
> (3) Substandard, careless, or inefficient work, ….
>
> Disciplinary Actions - General Offenses
>
> Committing any General Offense can result in the following actions being taken:
> (1) First offense: Written first warning notice,
> (2) Second offense of any nature: Second written warning notice.
> (3) Third offense of any nature: Final written warning notice, disciplinary suspension, or discharge,
> (4) Fourth offense of any nature: Discharge ….
>
> Major Offenses
>
> The following offenses are subject to the disciplinary action indicated: ….
> (2) Gross negligence in performing duties.
> (3) Failure to report any errors … or poor workmanship to supervision,….
>
> Disciplinary Actions—Major Offenses
>
> Committing any Major Offense can result in the following actions being taken:
>
> (1) First offense: Written final warning notice, written final warning notice and disciplinary suspension, or discharge.
> (2) Second offense: Discharge, ….

(Jt. Exh. A.)

b. Thomas Smith and Rodney Horn Disciplines

On November 17, 2016, Triumph suspended unit employee Smith and then fired him for poor workmanship following its investigation. (R. Exh. 11.) On April 3, 2017, Triumph issued Unit employee Horn a 5-day suspension for gross negligence. (Jt. Exh. Z; R. Exh. 13.) These actions occurred without notice to the Union or pre-implementation bargaining.

2. Analysis[6]

a. Legal Precedent

In *Oberthur Technologies of America Corp.*, 368 NLRB No. 5, slip op. at 3 (2019), the Board held as follows:

> [W]hen an employer does not change its pre-existing disciplinary policies but merely exercises some discretion in applying them, the imposition of discipline pursuant to those policies does not constitute a change in a term or condition of employment …. and the employer is not required to give the union

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

[2] Its aerospace customers include Bell Helicopter, Boeing, Gulfstream, Northrup Grumman, and Pratt & Whitney.

[3] In October 2013, Triumph began transferring bargaining unit employees to the Red Oak facility.

[4] There are approximately 500 employees in the Unit.

[5] These allegations are listed under ¶¶ 12, 14, 15, and 17 of the complaint.

[6] The parties agreed that these decisions were discretionary under *Total Security Management Illinois I, LLC*, 364 NLRB No. 106 (2016).

notice and opportunity to bargain before it makes its disciplinary decision ….

b. Discussion

Triumph did not violate the Act, when it unilaterally disciplined Smith and Horn without affording the Union notice and the opportunity to conduct pre-implementation bargaining. Triumph disciplined them pursuant to its preexisting Red Oak discipline policy covering gross negligence and poor workmanship. (Jt. Exh. A.). Although Triumph exercised discretion, as stipulated, when applying its policy, it did not change any term or condition of employment that required pre-implementation bargaining. *Oberthur Technologies*, supra.

C. Bond Shop Layoff[7]

1. Facts

a. Extant Layoff Policy

In 2013, Triumph set the following Red Oak layoff policy:

> **Definitions** RIF Unit: The peer group against which employees in the same classification are compared ….
>
> **Notifications …** The layoff notification period … is typically one week ….
>
> **General Rules** Management will … assess … the … statement of work and determine the skills and abilities needed …. [and] determine … where reductions will occur.
>
> Employees … will be rated … upon … the skills and abilities defined above. In addition, factors such as experience, performance, education and documented concerns regarding performance, conduct or similar issues, will also be considered ….
>
> HR … must … approve all layoffs ….

(Id.)

b. 2016—2017—Decreased Orders

In 2016 and 2017, Triumph experienced an unexpected downfall in orders from Bell Helicopter and Gulfstream. (Jt. Exh. Z.) This shortfall reduced its bond shop staffing needs,[8] which, in turn, caused it to be overstaffed by 15 workers. (GC Exh. 10, R. Exhs. 15–16.) On this basis, Triumph was forced to consider a layoff.

c. March 28, 2017—Layoff Notice

On this date, Triumph sent this letter to the Union:

> This letter serves as official notification … that the Company tentatively plans to … layoff … 12 … unit employees in the bond shop. The Company … is considering a layoff [for] … April 21, 2017 ….
>
> [L]ayoffs are due to a … production slowdown in G600 and P-42 Programs ….
>
> [U]nit employees subject to layoff have not yet been selected from within the bond shop. The Company intends to comply with the status quo layoff policy in making layoff selections. This layoff policy has been in effect [since] …. 2014 ….
>
> The Company also is willing to discuss … these tentative layoffs …. [and] a potential loan agreement to keep … employees gainfully employed …. [P]lease let me know … [by] … April 7, 2017, if … the Union wishes to participate in the layoff process, discuss loan potentials or would like additional information. The Company intends to make a final decision … by … April 10, 2017.

(Jt. Exh. G.)

d. March 30, 2017—Union Requests Layoff Bargaining

The Union requested bargaining, and sought this information:

- A list of Bond Shop employees, in seniority … order.
- A list of Bond Shop employees not transferred to Red Oak from Marshall Street or Jefferson Street that are … unit employees … [by] hire date ….
- Any disciplinary action the Company will use in the layoff evaluation process for all Bond Shop employees.
- Attendance unit cards for all Bond Shop employees from April 1, 2016 through April 1, 2017.
- A list of employees separated by Lead for Bond Shop assignments ….

(Jt. Exhs. H, I.)

e. March 31, 2017—Triumph's Reply to the March 30 Information Request

Triumph offered this reply to the Union's information request:

> 1. A list of Bond Shop employees, in seniority order ….
>
> The requested list is attached hereto as Attachment 1….
>
> 2. A list of Bond Shop employees not transferred to Red Oak from Marshall Street or Jefferson Street ….
>
> The Company … provided a list of all bond shop employees … above [with hire dates showing those hired after Red Oak's opening] ….
>
> 3. Any disciplinary action the Company will use in the layoff evaluation process for all Bond Shop employees.
>
> The Company proposes to consider any and all active discipline ….
>
> 4. Attendance unit cards for all Bond Shop employees from April 1, 2016 through April 1, 2017.[9]
> The Union's request for a calendar years' worth of attendance cards is burdensome and will require numerous man hours to produce …. The Company requests the Union clarify … why such information is pertinent to … bargaining over the … tentative layoff plans. Inasmuch as … attendance discipline would be considered in the evaluation process, the Union has been

[7] These allegations are listed under ¶¶13–14, and 16–17 of the complaint.

[8] The bond shop finishes aerospace components by applying adhesive to, and chemically bonding, sub-parts.

[9] Triumph ultimately provided these timecards at an April 19 bargaining session. (GC Exh. 5.)

provided all such discipline …. [A] ttendance cards would not be used in said evaluation, so …. [p]lease clarify … relevance ….

5. A list of employees separated by Lead for Bond Shop employees.

The requested list is attached hereto as Attachment 2 ….

(Jt. Exh. J.)

f. April 5, 2017—Triumph's Initial Layoff Proposal

Triumph offered this proposal to the Union:

- ln lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications … for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected ….
- The Company … [has] sole discretion to determine … loaned [workers] ….
- The Company … [has] sole discretion to determine the[ir] job assignments ….
- Should an individual employee refuse to be loaned … , the employee shall be deemed to voluntarily terminate his employment.

This agreement … shall not be cited by either party as precedent setting.

(Jt. Exh. K.) Danielle Garrett, Director of Employee and Labor Relations and chief spokesperson, stated that Triumph's proposal was generous, allowed affected workers to keep their jobs without a pay cut, and capped displacement at 6 months. She was both surprised and disappointed by the Union's rejection of this solution.

g. April 6, 2017—Bargaining Session[10]

The parties attended a layoff bargaining session. Union president James Ducker and several employees represented the Union, while Garrett and Human Resources Representatives Jorge Gil and Wendy Bailey represented Triumph. (R. Exh. 5.) The Union offered this counter:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees … for a period not to exceed six (6) months ….
- Employees who are loaned will not have their compensation affected ….
- The Company will seek volunteers to loan.
- The Company will make every attempt to place loaned employees into positions where they may have previous experience or may be successful.
- The Company will collaborate with the Union to satisfy these loans.
- Should an individual employee refuse to be loaned … , the employee shall be laid off for a period not to exceed six (6) months ….

(Jt. Exh. L.) In rejecting the Union's proposal, Garrett explained that the layoff required Triumph to unilaterally and expeditiously choose the temporary transfers for business reasons, and that first seeking volunteer transfers could detrimentally affect bond operations that were already strained. See also (R. Exh. 5, GC Exh. 3.) She added that the Union's proposal contained ambiguities that would cause unexpected interpretation and labor relations issues.

Triumph offered this counter, which added a vehicle to handle unexpected transfer issues:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees … for … [up to] six (6) months ….
- Employees who are loaned will not have their compensation affected ….
- The Company … [has] sole discretion [as to] … [who] will be loaned ….
- The Company … [has] sole discretion [as to their] … assignments ….
- Should the Union have concerns regarding a loaned employee … , the Company will meet … to … attempt to reach mutual resolution.
- Should an individual employee refuse to be loaned … , the employee shall be deemed to voluntarily terminate his employment.
- Should the need arise to increase the number of employees loaned out … , the parties will meet to discuss the possibility of an increase of scope.

(Jt. Exh. M.) Garrett repeated that Triumph needed flexibility regarding who to select and could not first solicit volunteers. Ducker indicated that the Union rejected this proposal because he felt that it was unfair for Triumph to discharge workers that refused transfers.

h. April 7, 2017—Bargaining Session

Ducker, Garrett and others attended. (R. Exh. 6.) The Union offered this counter:

- … [E]mployees shall be … [laid off in classification] seniority order ….
- The l[east] … senior employees will be offered a transfer into … Assembly …. [and] placed into … [a] training Assembly class.
- Employees … transferred from the Bond Shop … into … Assembly …. will not have their compensation or seniority calculation date affected.

(Jt. Exh. O.) Garrett rejected this proposal. She pointedly disagreed with bond shop workers transferring into assembly with no experience and retaining their wage, which was higher than the

[10] The parties often combined broader bargaining for a first collective-bargaining agreement with bond shop layoff negotiations at these meetings.

wage paid to many experienced assemblers. See also (R. Exh. 6, GC Exh. 4).

Later that day, Triumph made this counter:

- …. the Company … [will] utilize a modified rack and stack based upon competencies as proposed by the Union ….
- Layoffs shall be … in accordance with the rack and stack scoring, based upon an employee's overall performance rating, with the bottom rated employees laid off in inverse seniority order by job classification. Seniority shall be determined by the last date of hire.
- Employees, who are affected by layoff, may apply for an open assembly position at … Red Oak …. Any employee affected by layoff who applies for an open assembly position, shall be given an offer of employment for the appropriate assembly labor grade at an hourly rate of pay commensurate with [their] … assembly … experience.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly, the employee shall be terminated.
- Employees who are laid off from either the bond or NDI classification shall have no rights to re-enter the[ir] classification ….

(Jt. Exh. P.) This proposal attached a "rack and stack" competency assessment, which allotted up to 3 points in these areas: attendance, safety, quality, discipline, and skillset.[11] (Id).

i. April 14, 2017—Union's Third Layoff Proposal

The Union offered this counter:

- Offer … a plant-wide retirement incentive to reduce … bond shop [staff].
- Employees who are affected by layoff may apply for an open assembly position at … Red Oak …. Any [laid off] employee … who applies for an open assembly position shall be given an offer … at their current rate ….
- Employees affected by layoff who … accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations … , the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, …:

- [Laid off] employees … may apply for … open … position[s] at … Red Oak …. Any employee affected by layoff who applies for an open bond shop position shall be given an offer of employment at the bond shop labor grade and hourly rate of pay … held at the time of layoff.
- [Laid off] employees … who … accept an offer for a bond shop position will retain their seniority and benefits without a break in service.

(Jt. Exh. Q.) The Union was concerned about the subjectivity of using rack and stack criteria.

j. April 18, 2017—Union Information Request

The Union then made this information request:

> The Union requests all evaluations of Bond Shop and NDI employees, the competencies used, [and] who evaluated each employee ….

(Jt. Exh. R.) This information was provided on April 20, 2017. (Jt. Exh. U.)

k. April 19, 2017—Bargaining Session

Ducker, Garrett and others attended. (R. Exh. 7.) Triumph provided Unit attendance cards to the Union, in full satisfaction of the Union's March 30 information request. (GC Exh. 5, R. Exh. 7.) Garrett questioned the several inconsistencies in the Union's April 14 proposal and rejected it due to, inter alia, its failure to fully explain the layoff and recall mechanism.

The Union then offered this counter:

- Employees within the bond shop who have been employed for less than forty-eight (48) months … shall be evaluated and laid off under the initial terms and conditions of employment, excluding active discipline.
- [Laid off] employees … may apply for … open assembly positions at … Red Oak location …. [and] shall be given an offer of employment at their current rate ….
- [Laid off] employees … who … accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly based on skill alone, the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, the following shall apply:

- [Laid off] employees … may apply for … open bond shop position[s] at … Red Oak [and] …. shall be given an offer … at the bond shop labor grade and hourly rate … held at the time of layoff.
- [Laid off] employees [who] … accept an offer [in the] … bond shop … will retain their seniority and benefits without a break in service.

[11] These ratings were mostly based upon objective criteria such as attendance, safety, quality and other disciplines.

(Jt. Exh. S.) Garrett rejected this proposal. She explained that Triumph could not limit the bond shop layoff to workers with 4 years of service, would not place bond shop employees in lower-paying assembly positions at their current rates, and would not create recall rights for transferred bond shop workers, who do not meet performance expectations. (R. Exh. 7.) The Union then requested several additional days to bargain and asked that the layoff be delayed, which Triumph rejected. Garrett averred that, by this point, the parties had exhausted their layoff approaches, had reached an impasse, and that continued discourse would be fruitless. Ducker indicated that additional time could have been proved useful.

Given Garrett's declaration of impasse, Triumph advised the Union that:

> [T]he parties have … bargain[ed] and have been unable to reach … agreement ….
>
> The Company … [will] move forward with its … layoff plan for the bond shop and will … layoff … twelve (12) … employees on … April 21, 2017 ….

(Jt. Exh. T.)

l. April 20, 2017—Triumph's Reply to the Union's Pending Information Request

On this date, Triumph stated as follows:

> Attached please find the rating or all bond shop employees ….
>
> Also attached are the competencies used and the description hereof.
>
> As far as NDI ratings, the Company has elected not to proceed with a layoff of NDI employees … [and] evaluations are not available to provide the Union ….

(Jt. Exh. U.)

m. April 21, 2017—Bond Shop Layoff

Triumph laid off 12 Unit employees from its bond shop. (Jt. Exh. Z.) The layoff was conducted in accordance with Triumph's final layoff proposal.

2. Analysis

a. Precedent

An economic layoff decision and its effects are mandatory bargaining topics, which require notice and an opportunity to bargain in good faith. See, e.g., *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004); *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). This principle remains true, even where a company previously exercised unlimited discretion before unionization. See *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990). A bargaining impasse cannot be reached where an employer presents a union with a "fait accompli" regarding a layoff. *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000).

When negotiations for a collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). While negotiations for a collective-bargaining agreement are ongoing, however, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." Id. There are exceptions, however, for situations where a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. *R.B.E. Electronics of S.D.,* 320 NLRB 80, 81 (1995). Moreover, even where a topic can be carved out of contract negotiations and handled separately, the employer must nevertheless provide the union with notice and an opportunity to bargain. *Id.* Once it does so, the employer is permitted to act unilaterally if the union fails to promptly request bargaining or if the parties, after good-faith bargaining, reach an impasse. *Id.* The Board defines the economic exigency exception as a heavy one, which requires implementation when the action is taken or involves an economic business emergency requiring prompt action. *R.B.E. Electronics of S.D.*, supra.

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists, AFTRA v. NLRB*, 395 F. 2d 622, (D.C. Cir. 1968), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." The burden of demonstrating an impasse rests on the party making the claim. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co*., supra at 478. The commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 762 (1999).

b. Discussion

As an initial matter, the parties properly separated bond shop layoff bargaining from collective bargaining for the entire agreement. The unanticipated reduction in Bell Helicopter and Gulfstream orders in 2016 and early 2017 caused bond shop overstaffing, which required immediate action. Triumph, therefore, satisfied its burden of demonstrating an economic exigency requiring immediate redress that could not wait for the finalization of a collective bargaining agreement that occurred a year later. See *R.B.E. Electronics of S.D.*, supra.[12]

Triumph reached a valid layoff bargaining impasse with the Union and properly implemented its last proposal following this

[12] Notably, the GC has not alleged that Triumph improperly separated layoff bargaining from overall negotiations.

impasse. Several factors demonstrate a good faith impasse. See *Taft Broadcasting*, supra. *First*, the parties enjoy a stable, 50-year, bargaining history. Triumph affirmed this positive relationship by voluntarily recognizing the Union in 2014 following its Red Oak opening and then finalizing contract in 2018 after good faith bargaining and absent a work stoppage. *Second*, the volume of bargaining exchanges demonstrates a valid impasse. The parties met no fewer than 4 times to negotiate, discussed 7 different written proposals, and exchanged multiple information requests.[13] *Third*, the breadth of layoff topics covered demonstrates a legitimate impasse. The parties comprehensively covered, inter alia, transfers in lieu of layoffs, seniority-based layoff systems, other layoff ranking systems, recall and separation rights, voluntary retirement systems, and voluntary separations. Garrett repeatedly offered reasonable and detailed rationales for Triumph's stances, highlighted ambiguities in Union proposals that could trigger unforeseen labor relations problems, and continuously asked valid questions to aid her understanding. *Fourth*, Triumph's overall willingness to shift from its opening position on transfers to a more standardized layoff ranking system showed flexibility consistent with good faith bargaining. *Finally*, and perhaps most importantly, Triumph's initial April 5 proposal was abundantly reasonable, and demonstrated a strong desire to reach agreement. Its opening salvo was to altruistically solve the overstaffing dilemma by not laying off anyone and only transferring affected bond shop workers to other departments for a short duration at their current pay. A proposal of ongoing employment at the same wage without the gamesmanship of holding it back until the eleventh hour of negotiations hardly paints the picture of bad faith. In sum, Triumph acted with fairness during bargaining, reached a valid impasse, and did not unlawfully implement its last layoff proposal.

CONCLUSIONS OF LAW

1. Triumph is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.
2. The Union is a §2(5) labor organization.
3. Triumph did not violate the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

Dated Washington, D.C. September 30, 2019

[13] The GC has not alleged that Triumph failed to reasonably fulfill the Union's information requests, which in some cases sought data that offered, at best, only remote bearing on the layoff issues at hand.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.